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IN THE

Supreme Court of the United States

October Term, 1945

No. 1082 50

GLASS CITY BANK OF JEANNETTE, PENNSYLVANIA,

Petitioner

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

Term, 1945

No.

In the Matter of the Victor Brewing Company, Bankrupt

Glass City Bank of Jeannette, Pennsylvania,
Petitioner

vs.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Supreme Court of the United States:

The petitioner above named, Glass City Bank of Jeannette, Pennsylvania, presents this petition for writ of certiorari, and shows unto the Supreme Court of the United States the following:

(A)

SUMMARY STATEMENT OF MATTERS INVOLVED

The question here presented is whether the Government has a lien by virtue of an income tax assessment on

property which was non-existent when the tax assessment was made and when the lien notices were filed.

Stated differently, does the Government when it makes an income tax assessment against an individual acquire a lien on everything the individual may thereafter earn or that may thereafter come into his possession without any further action on the part of the Government by way of issuance of an attachment or distraining warrant?

The fund in dispute in this case was awarded to one F. A. Maddas in a bankruptcy proceeding for services performed by Maddas while acting as a State Court Receiver for the company which was later adjudicated a bankrupt (R. 6a). The services for which the fee was awarded were performed five years after the tax assessment had been made and after lien notices were filed in the office of the Clerk of the United States District Court and in the office of the Prothonotary of Westmoreland County, Pennsylvania (R. 6a).

The Government's position is that once an income tax assessment list is received by the collector and notice and demand made the lien promptly attaches to everything that person may thereafter earn or acquire until the tax is paid or the lien becomes ineffective by lapse of time. The Government's contention rests on 53 Stat. 448, 26 U. S. C. A. 3670, which provides that if any person liable to pay any tax refuses or neglects to pay the same after demand the amount "shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person."

The Government issued no attachment of any charac-

ter and took no action of any character to subject the fund to the payment of the tax.

The claim of the Glass City Bank, on the other hand, is predicated on an attachment execution which issued out of the Court of Common Pleas of Allegheny County, Pennsylvania, on a judgment against Maddas, in which the Trustees in Bankruptcy for the Victor Brewing Company were named as garnishees (R. 7a).

The Bank's position is that since Section 3671 specifically provides that the lien of 3670 arises at the time the assessment list is received by the collector that the lien can attach only to existing property or rights of property of the taxable, and that the future earning power of a taxable is neither property nor a right of property to which a lien could attach. Other sections of the Revenue Act make specific provisions for subjecting after acquired property of the taxable either to a lien or to the payment of a tax.

The Bank further takes the position that since the Government failed within the time limited by law to either enforce any lien it might have had or to subject the property in suit to the payment of the tax that it lost its right to do so.

The case involves an important conflict between the decisions of the Circuit Court of Appeals for the Second Circuit on the one hand, and the decisions of the Circuit Court of Appeals for the Ninth Circuit on the other. The Circuit Court of Appeals for the Third Circuit, in deciding this case, followed the decision of the Ninth Circuit.

The Court of the Second Circuit, in the case of *United States v. Long Island Drug Company*, 115 F. (2) 983 (De-

cember 16, 1940) held that the Government's lien for taxes attached only to property in existence at the time the notice was filed and the levy made. It held that the lien did not attach to property which came into the taxpayer's hands or possession or to a salary that was earned after notice and after levy. In doing so, the Court followed the decision of this Court in the case of *Savings Bank of Danbury v. Loewe*, 242 U. S. 357, 37 S. Ct. 172, 61 L. Ed. 360, holding that in the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect future earnings or salary.

The same principles were decided in the cases of *United States v. Warren Railroad Company*, U. S. C. A., Second Circuit, 1942, 127 F. (2) 134, and in *United States v. Western Union Telegraph Company*, Second Circuit, 50 F. (2) 102.

The Third Circuit, in deciding this case, relied on two decisions of the Ninth Circuit; *Citizens National Bank of Los Angeles v. United States*, C. C. A., Cal., 1943, 135 F. (2) 527, and *Nelson v. United States*, U. S. C. A., Ninth Circuit, 131 F. (2) 301.

The decision is also in decided conflict with the local laws of Pennsylvania. In Pennsylvania, as in virtually all States in the Union, the future earning power of an individual is not property. A person cannot assign or sell or pledge his future earning power, and it is, therefore, not the subject of a lien.

(B)

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) sustains the jurisdiction of this Court.

(C)

DATE OF JUDGMENT AND ORDER TO BE REVIEWED

The decree or judgemnt of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court of the United States for the Western District of Pennsylvania awarding the fund in dispute to the Government was rendered and entered December 29th, 1944 (R. 19). The time for filing petition for certiorari expires March 29th, 1945. This petition is filed within that time.

(D)

TIME AND MANNER IN WHICH QUESTIONS WERE RAISED BELOW

The District Court of the United States for the Western District of Pennsylvania restrained the Glass City Bank from pursuing its attachment execution in the State

Courts, and ruled that since its own Trustee was involved, jurisdiction to determine the disposition of the fund should be retained by the United States Court (R. 1a, 2a, 3a). This was followed by a petition of the Glass City Bank for a rule on the Collector of Internal Revenue and other parties involved to show cause why the fund should not be paid to the bank (R. 3a).

Answers were filed by the Collector of Internal Revenue and other parties involved, and a hearing was held before the Referee in Bankruptcy, who made findings of fact which were not in dispute in the Court below (R. 8a).

The District Court of the United States for the Western District of Pennsylvania awarded the fund to the United States, and the Circuit Court affirmed this decision (R. 16a, 22).

(E)

OPINIONS OF THE COURT BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is reported in 54 F. Supp. 11, and the opinion of the United States Circuit Court of Appeals for the Third District is unreported at this time but is printed in the Record (R. 19).

(F)

QUESTIONS PRESENTED

Does the Government, by virtue of 53 Stat. 448, 26

U. S. C. A. 3670, which gives it a lien upon "all property and rights of property, whether real or personal, belonging to" the taxable, acquire a lien on such intangibles as the future earning capacity of the taxable?

Where a fund in the hands of a garnishee represents sums awarded to a taxable in a bankruptcy proceeding for services rendered while acting as a State Court Receiver and the services were all performed after the tax was assessed, and after notice and demand, and the Government takes no action whatever to subject the fund to the payment of the taxes, is the Government entitled to the fund in preference to an attaching creditor?

Where the Government is required to proceed to enforce its lien by distraint or by civil action within a definite time, and it fails to do so, or to show that the time was extended, does the Government lose its lien?

(G)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The questions here presented are of considerable importance to every employer, to every employee, and to every person engaged in trade of any kind.

A lien is something real. It is the hold or claim which one person has upon the property of another as security for some debt or charge. The lienor has the right to hold or detain the property until the claim or charge is satisfied.

The Statute in question gives the Government a lien

for unpaid taxes "upon all property and rights of property, whether real or personal, belonging to such person." It further specifies "The lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforcible by reason of the lapse of time." 53 Stat. 448 and 449, 36 U. S. C. A. 3670 and 3671.

The statute is thus specific that the lien arises at a particular time, namely, when the assessment list was received by the collector. If it is to exist at all, it must exist at that time. If it is to attach to property or rights of property, it must attach at that time.

In the case at bar, the assessment list was received by the collector August 12th, 1935, and notices and demands were made August 13th and August 24th, 1935 (R. 12a). The fund which is the subject of this litigation was not in existence at that time. The award was made to Maddas for services performed by him five years later, in 1940, while he was acting as a State Court Receiver for the Victor Brewing Company (R. 6a, 10a).

The decision of the Third Circuit can be upheld only on the ground that property and rights of property to which the lien attaches at the time the assessment list is received by the collector include the future earning capacity of the taxable as well as any property which he may thereafter acquire by any means whatsoever. Future earning capacity has never been considered either property or a right of property. It amounts to almost an absurdity to assert that the Government, in 1935, acquired a lien on something that did not exist and could not conceivably be ascertained until 1940.

That Congress did not intend the sections to have the effect given to them by the Court below is indicated, not only by the plain words of the Act, but by the numerous provisions made in subsequent sections for subjecting property of every character to the payment of the tax.

There is no doubt that the collector might have, by the issuance and service of a distraint warrant, subjected this particular fund to the payment of the tax, but he did not do so. Congress, by enacting these provisions which permit the Government to keep its lien alive and to subject after-acquired property, wages included, to the payment of the tax, indicates plainly that it never intended the language "property and rights of property belonging to the taxable at the time the assessment list is received by the collector" to include future earning capacity.

The property and rights of property to which the lien attaches when the assessment is made are admittedly entitled to a broad interpretation. Whatever right or dominion the taxable has over such things as are permitted by the State to be the subject of ownership are subjected to the lien if they belong to the taxable. When the assessment lists came into the hands of the collector, by the very nature of things, the property or right of property had to be something that the Government could lay hold of by one of the many processes made available to it. Neither the Government nor any other creditor can, by any execution process known in the United States, attach and sell a man's future earning power or his right to inherit, or in any manner acquire property in the future. Neither can a lien attach to such right.

If the Government ever had any lien on the fund in

suit in this case, it was lost because the collector failed, within the time limited by law, to enforce its lien. 53 Stat. 87, 26 U. S. C. A. 276, enables the collector to collect the tax by distraint or by a proceeding in court. The section specifies, however, that the collector may do this "only if begun" within six years after the assessment of the tax or prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

It appears definitely by the record in this case that no distraint or other proceedings were ever instituted by the Government, and there is no showing that an extension agreement was entered into. The limitation applies whether the Government has or does not have a lien.

This important conflict between the decisions of the Second Circuit on the one hand and the decision of the Third and Ninth Circuits on the other hand can be resolved only by this Court. The opportunities of people, against whom tax liens have been filed, to find employment will certainly be hampered if the Government has a lien on their future earning capacity, and consequently on any moneys they earn. What is the status of an employer who pays wages to an employee when the Government has a lien on such property? What is the position of a bank that pays out money which the taxable may have placed in the bank after the date of the assessment? What is the position of the automobile dealer who makes the trade of an automobile after the tax assessment? What is the position of any one who accepts property in the hands of a delinquent taxpayer? All these and many more questions are posed if the decision of the Third Circuit remains in force.

In Pennsylvania, as in practically all other States, possession of personal property is a badge of ownership. An individual who would subject personal property to a lien must reduce it to possession otherwise the lien is ineffective. If the decision of the Third Circuit is the law applicable in Pennsylvania then a species of secret lien has been created which is contrary to the whole policy of the law pertaining to liens.

Wherefore the petitioner respectfully prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing said Court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled upon the docket of said Court; and that the decree of the Circuit Court of Appeals affirming the decision of the District Court of the United States for the Western District of Pennsylvania be ordered set aside, and judgment entered awarding said fund to the petitioner, and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

THE GLASS CITY BANK,
Jeannette, Pa.,
Petitioner.
By FRED B. TEESCHER,
Its Counsel of Record.

SUPPORTING BRIEF

SPECIFICATIONS OF ERROR

The petitioner assigns the following errors in the record and proceedings in this case:

The Circuit Court of Appeals for the Third Circuit committed fundamental error in affirming the judgment of the District Court because

The Act of Congress under which the Government claims, 53 Stat. 448, 26 U. S. C. A. 3670, made the tax a lien only "upon property and rights of property belonging to the taxable." 53 Stat. 449, 26 U. S. C. A. 3671, specifies that "the lien shall arise at the time the assessment list was received by the collector."

The fund which is the subject of this litigation and on which the Government seeks to fasten its lien was not in existence at the time the assessment list was received by the collector, and did not come into existence until five years later, when it was awarded to Maddas for services performed by him while acting as a State Court Receiver for a company which was later adjudicated a bankrupt.

The future earning power of a taxable is neither property nor a right of property within the meaning of 53 Stat. 448, 26 U. S. C. A. 3670, and moneys which a taxable thereafter earns or acquires are not subject to a lien unless specifically subjected by garnishment

or by distraint as provided by other sections of the Revenue Act.

Section 3670 is not self executing. Under 53 Stat. 87, 26 USCA 276, the government must proceed by distraint or by proceeding in court to subject property to the payment of the tax. No proceeding has ever been instituted by the government, and the time for instituting one has passed. If the government had a lien, it was lost before this proceeding was started by the Glass City Bank.

ARGUMENT

THE LIEN OF SECTION 3670 ARISES WHEN THE ASSESSMENT LIST IS RECEIVED BY THE COLLECTOR

The decision of the Circuit Court of Appeals for the Third Circuit in this case is in conflict with a decision of the Second Circuit on the same subject, and is in conflict with the applicable local law of Pennsylvania.

The decision of the Court below in this case holds that the Government has a lien on a fund which did not come into existence until five years after the tax was assessed and the assessment list received by the collector of Internal Revenue. The Acts of Congress under which the Government asserts its lien specify that the lien shall arise at the time the assessment list was received by the collector, and that the tax shall be "a lien in favor of the United States on all property and rights of property, whether real or personal, belonging to the taxable." The fund was awarded to the taxable, Mr. Frank A. Maddas, for services performed as a State Court Receiver. The decision of the Court below can be supported only on the theory that the future earning power of a taxable is property or a right of property to which the lien affixes at the time the assessment list was received by the collector.

The Acts of Congress under which the Government asserts a lien are as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 53 Stat. 448, 26 USCA 3670

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time," 53 Stat. 449, 26 USCA 3671

The Government neither issued nor served any distraint warrant nor garnishment proceedings to subject the fund to a lien or to possession so its rights depend squarely upon whether the future earning power of a taxable is property or right of property to which a lien attaches when assessment lists are received.

THE TAXABLE'S FUTURE EARNING POWER IS NOT PROPERTY OR A RIGHT OF PROPERTY AND CONSEQUENTLY IS NOT THE SUBJECT OF A LIEN

In the case of *United States v. Long Island Drug Company*, 115 F. 2d, 983 (December 16, 1940), the Circuit Court of Appeals for the Second Circuit decided definitely that the Government's lien for taxes attached only to property in existence at the time the notice was filed or the

levy made, and that it did not attach to property that came into the taxpayer's hands or possession or to a salary that was earned afterwards. In that case, the Government's position was much stronger than in the case at bar because it had issued and served on the Long Island Drug Company a distraint warrant, and had served a demand on the Long Island Drug Company requiring it to surrender all property or rights of property of the taxable. At the time of the service of the distraint, the taxable was in the employ of the Long Island Drug Company, and working under an existing contract of employment. The sections of the Internal Revenue Code, under which the Government thus sought specifically to acquire a lien are as follows:

> "If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint, and sale, in the manner provided in this subchapter, of the goods, chattels or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid." 53 Stat. 451, 26 USCA 3690
>
> "(a) Requirement. Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collection making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judgment process.

"(b) Penalty for violation. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not to surrender, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interests from the date of such levy." * * *

53 Stat. 456, 26 USCA 3710.

It will be observed that Section 3690 uses the words "goods, chattels of effects, including stocks, securities, bank accounts, and evidences of debt," while the latter section uses the words "property or rights to property", the same as section 3670.

The facts in that case were as follows: In May of 1933, the Commissioner of Internal Revenue assessed a distilled spirits tax against Charles Steinberg, et al. Demand was made July 14, 1933. On April 15, 1936, a notice of lien was filed in the clerk's office for the Eastern District of New York. On June 15, 1936, another notice specifying an additional amount for accrued interest was filed. On March 7, 1939, the Long Island Drug Company was served with notice of levy. When the notice of April 15, 1936 was filed, Steinberg was indebted to the Long Island Drug Company in account of overdrawn salary. After filing of the notice, Steinberg entered into an arrangement with the Drug Company under the terms of which the Drug Company was to advance certain sums to his wife and the salary as it was earned was to be applied on the note which was given to secure the loan. Steinberg also signed the note.

Between the filing of notice of 1936 and the service of the distraint in 1939, there accrued to Steinberg on account of salary an amount more than sufficient to take care of the government's claim. It, however, was less than the amount of the note and had been applied on the note. The District Court had entered judgment directing the Drug Company to pay, holding that the notice operated to give the government a lien on the salary which from time to time accrued to Steinberg. The Circuit Court reversed holding that the salary to be earned in the future, that is subsequent to the filing of the notice, is not the subject of a lien. On page 986, the Court said:

> "Though we shall assume that a salary or wages which have been earned may be made subject to a lien for unpaid taxes and also subject to distraint and levy, the situation in respect to future earnings is quite different. They are contingent upon performance of a contract of service and represent no existing rights of property. They are quite distinguishable from the right of a cestui que trust whose equitable life estate may be subjected to a lien on behalf of the government for unpaid taxes. Matter of Rosenberg's Will, 269 N. Y. 247, 199 N. E. 206, 105 A. L. R. 1238; United States v. Canfield, 9 Cir., 29 F. Supp. 734. In the same way they are distinguishable from a taxpayer's interest in an insurance policy upon his life, Kyle v. McGuirk, 3 Cir., 82 F. 2d, 212; Cannon v. Nicholas, 10 Cir., 80 F. 2d 934. Neight right of the taxpayer is contingent but is a fixed right to realize property or income derived therefrom dependent upon no future performance. Rights which do not exist at the time of the demand upon the taxpayer are not subject to any

lien, United States v. Pacific R. R. Co., Mo., 1 F. 97. Here there was no showing that the taxpayer had any claim against the Drug Company when the demand upon him for payment was made. * * *

In the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect future earnings or salary. Savings Bank of Danbury v. Lowew, 242 U. S. 357, 37 S. Ct. 172, 61 L. Ed. 360. Moreover there would seem to be no justice in depriving the garnishee of its right to set off which, so far as the record shows were acquired for a valuable consideration before the demand was made on the Drug Company by the collector. Both on April 15, 1936, when payment was first demanded of the Drug Company, and on March 7, 1939, when the last demand was made, the latter owed no debt to Steinberg upon which distraint could be made. We find nothing in Section 3690 or Section 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will reach an indebtedness which has accrued."

The Circuit Court of Appeals for the 2nd Circuit again recognized the principles contended for by the Glass City Bank in the case of *United States v. Warren Railroad Co.*, USCA, 2 Cir., 1942, 127 F. 2d, 134. In that case, the government sought to subject certain rentals to the payment of income taxes of the defaulting lessors of the railroad. No rentals were due when the levies were made. One of the questions before the Court was whether the government's lien attached to future rentals. The Circuit Court held that it did not. The Court, in its opinion, said:

"Finally, the government seeks to sustain the judgments upon the theory that it has a lien on the rentals accruing under the leases. It can, however, have no right under any theory beyond that of lessors themselves. In the United States v. Western Union Telegraph, 2 Cir., 50 F. 2d 102, we said rentals could not be reached because there could be no levy on intangible rights. But since that decision was rendered we have held that the indebtedness of a third party to a taxpayer is subject to distraint and upon demand must be surrendered to the collector by virtue of Sec. 3710, Title 26, USCA. Int. Rev. Code, United States v. Long Island Drug Co., 2 Cir., 115 F. 2d, 983. * * *

The difficulty with levying upon the rentals prior to their due date is because of the common law rule that a creditor cannot levy upon rent until it becomes payable. * * *

We cannot discover that at the time when the levies were attempted any rentals were due and payable, or that the lessee was in possession of any property of the lessors at the time the notice of lien and levy were served. Accordingly the judgments that the lessee, Lackawanna & Western Railroad Company, pay the amount of income taxes, interest and costs as a personal obligation were improper and should be reversed and the cases remanded to the District Court in order that the United States may file a supplemental petition for a judgment in each action providing: (1) That the lessee be enjoined from making further payments to the stockholders of the lessors out of any rentals now or hereafter payable until the United States shall, from time to time, have an opportunity to

levy thereon so that the income taxes and interest may be satisfied; (2) that the lessee pay to the collector the amount of rentals levied upon, from time to time, which may be necessary to satisfy the income tax obligations."

In discussing the Warren Railroad case, the District Court, in its opinion, attempts to construe it as supporting the Government's position (R. 14a). The contrary is true. The case specifically holds that future rentals are not the subject of a levy, and consequently not the subject of a lien. The Second Circuit reversed the District Court and wiped out the judgment which had previously been entered under Section 3710 of the Internal Revenue Code. The District Court further attempts to make an analogy between an existing lease and an existing employment (R. 15a). Both premise and the conclusion are incorrect. Future rentals are not the subject of attachment or lien because the lessor has no right or property in the rentals until they are due, as noted by the Court in the Warren case. Maddas was not a State Court Receiver at the time the lien arose. If the government has any lien, it arose when the collector received the assessment list on August 12th, 1935. Maddas did not become such a State Court Receiver until three years later, December 26th, 1938. (R. 6a). The fund which is the subject of dispute accrued to him for services performed between July 29th, 1939 and October 22nd, 1940 (R. 10a).

Congress, in specifying that the lien should arise at the time the assessment list was received by the collector, adopted almost the precise language used by the Court in the case of the *United States v. Pacific Railroad, et al.*, 1 F. 97. The Revenue Act of July 13, 1866, 14 St. at Large,

107, Rev. St. 3186, gave a similar lien on all property or rights of property belonging to the taxable from the time the tax was due. The Circuit Court of Appeals (E. D. Mo. March 13, 1880) held that the lien arose when the demand was made, and that it attached only to property then owned by the taxable. In disposing of the case, the Court, in its opinion, said:

> "But if, upon making demand now, at the end of 10 or 15 years from the time when the taxes were due, the government can establish a lien upon all property then owned by the delinquent taxpayers, it would result that in most cases not the guilty, but the innocent, would be made to suffer. Such a doctrine would also unsettle the titles to real estate, since it would be impossible to know or to ascertain whether the owner has not, during the existence of the income tax law, suppressed the truth as to his receipts and earnings, or made a false return thereof. In my opinion the language of the statute does not require the construction contended for by counsel for the government. If congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who became owners years before any step was taken by the government to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology: 'If any person * * * liable to pay a tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, * * * upon all property, etc., belonging to such person,' etc. The

statute does not say 'upon all property which may have belonged to such person when the tax accrued'.

This or similar language would, I think, have been employed if congress had intended to give the statute this effect. It must be conceded that the words 'all property * * * belonging to such person' must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the language of the law, refer them to the time when the tax became due, and make the clause read 'all property, etc., belonging to such person, etc., at the time the tax became due.' This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: 'All property, etc., belonging to such person at the time such demand is made.' By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand. The view also harmonizes with the general policy of the law relating to land titles, which to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable

time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character."

The decision of the Second Circuit is in complete harmony with the applicable local law. Under the law of Pennsylvania, future earnings are not regarded as property or a right of property. Future earnings, except under an existing contract, cannot be made the subject of an assignment, and consequently could not be the subject of a lien.

"A right presently existing but only to come into possession upon a contingency is assignable at law; but a mere expectancy, a right which, while it may grow out of present circumstances, has no present existence, does not pass by a voluntary assignment; as, for example, an interest in the estate of a person who is still living: Lennig's Estate, 182 Pa. 485. And rights growing out of circumstances which do not yet exist are not assignable at all, even for value, for there is no subject-matter on which to operate; as, for example, wages to be earned in an employment not yet begun and not yet contemplated."

Fisher's Estate, 14 Pa. D. & C. 89.

"The future earnings constituted a mere possibility, coupled with no interest. * * * To hold that the

right to collect the wages was continuous and irrevocable, as against all employes (should be employers) of Trumbower, would be monstrous, as it would put him in the absolute power of Laubach."

Trumbower, to use v. Ivey & Rapp, 2 Pa. C. C. Reports 470.

"An assignment of wages to be earned in the future executed when the assignor was not in the employment of the party from whom payment of the wages is demanded by virtue of the assignment, is void, as against public policy, and will not be enforced by the courts."

Woodring v. Lehigh Valley Railroad Co., 2 Pa. C. C. Reports 465.

"We are, however, clearly of the opinion that an assignment like the present one, which professes to transfer a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer."

Jermyn v. Moffitt, 75 Pa. 399, 402.

The decisions of numerous other States are to the same effect. The following are examples: *Jules-Wallace & Co. v. R. A. Management*, 265 N. Y. Supp. 202, 148 Misc. 180; *Port v. Chicago & New York Railroad Company*, 156 N. W. 469, 471, 162 Wis. 446; *Walker v. Rich*, 249 Pac. 56, 79 Cal. App. 139; *Baust v. Fairfield Farms Dairy*, 148 A.

236, 158 Md. 280; *McKneeley v. Armstrong,* 210 S. W. 192, 109 Texas 363; *Emerson v. European etc. Railway Co.,* 67 Maine 387.

Since Section 3670 does not undertake to define the terms "property" and "rights of property", it is proper to turn to the State law for their meaning. *Poe v. Seaborn,* 282 U. S. 101, 118, 51 S. Ct. 58, 75 L. Ed. 239.

Counsel for the petitioner, Glass City Bank, respectfully asserts that the petitioner's position finds support in the decision in *Investment & Securities Company v. Robbins* (District Court E. D. Washington, N. D.) 49 Fed. Supp. 620, notwithstanding the fact that this decision is cited by the court below in support of its decision (R. 21). There the taxable was the owner of shares in a national bank. The bank was in receivership. By virtue of his ownership of the stock and the payment of a stock assessment, the taxable was entitled to a proportionate share of the proceeds resulting from the liquidation of the assets after creditors were paid in full. He had this right when the assessment list had been received by the collector February 18, 1934. The intervenor claimed by reason of an assignment which had been made three years later, July 27, 1937, notice of which had been given to the receiver or stockholders' agent March 14, 1938. The assignment specifically stated that it was subsequent and junior to the lien of the United States for taxes, if any existed. As the court well noted. "The intervenor, asserting as it does, that Rosenbush had an interest in those assets which he could pledge in 1937 can hardly be heard to say that he did not have an interest in those assets which could be subjected to a lien in 1934." After noting that under the Statute Sections 3670 and 3671, the lien came into existence when the assessment

list was received by the collector and that the lien attached to all property then owned by the taxable, and after noting that the property or right of property in dispute was at that time owned by the taxable, the Court says:

> "Property within the tax laws should not be given a narrow or technical meaning. Commissioner of Internal Revenue v. Stephens-Adamson Manufacturing Co., 7 Cir., 51 F. 2d 681; Where a right is subject to ownership or transfer and may be brought within the dominion and control of the court through some recognized process, it is property."

Applying that definition of property to the case at bar, Mr. Frank A. Maddas, in 1935, when, by the very words of the statute, the lien arose, had no right or interest in money or property which did not come into existence until five years later. In 1935, he had no ownership or right of property in money which he might or might not earn in some future employment. There was nothing which could then be brought within the dominion and control of the court through any recognized process.

The District Court, in deciding the case, did not consider its decision in conflict with United States v. Long Island Drug Company. The Court, on page 623, said:

> "There is nothing in the case of United States v. Long Island Drug Co., Inc. 2 Cir., 115 F. 2d, 983, 986, on which Intervenor relies, which runs counter to this conclusion. In that case, the moneys attempted to be subjected to the lien were wages earned by the taxpayer after the filing of the assessment list and the demand for payment and after levy upon the defendant. In that case, the court definitely recognized the

rule laid down in Re Rosenberg's Estate, supra., and in United States v. Canfield, supra. It used this language: 'They (future earnings) are contingent upon performance of a contract of service and represent no existing rights of property.' "

THE DECISION OF THE COURT BELOW COMPLETELY OVERLOOKS THE FACT THAT SECTION 3671 FIXES A SPECIFIC TIME WHEN THE LIEN OF 3670 ARISES, AND THAT SECTIONS 3678, 3690, 3710 AND 3692 PROVIDES A SPECIFIC METHOD BY WHICH AFTER ACQUIRED OR OTHER PROPERTY BELONGING TO THE TAXABLE AND NOT SUBJECT TO THE LIEN OF 3670 MAY BE SUBJECTED EITHER TO THE PAYMENT OF THE TAX OR MAY BE IMPRESSED WITH A LIEN

The other two cases relied upon by the Court below for its decision, it must be conceded are in conflict at least in principle with the decision of the Second Circuit and the position that the petitioner takes here. The things to which the government sought to fasten its lien in these cases were, first, an inheritance which had come into existence after the tax assessment had been received by the collector, and the second, a crop of grapes grown after the tax assessment had been made. It could well be that a distinction should be made on grounds of public policy between property which accrues to a taxable by reason of personal efforts, and property acquired in other ways. Counsel for the petitioner respectfully asserts that no such distinction is necessary because the reasoning upon which

the decision of the majority in Citizens National Bank of Los Angeles v. United States is based is unsupportable. The first reason assigned is that the Revenue Act formerly provided that the government's lien should continue until paid but this was amended to read "shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time," 53 Stat. 449, 26 U. S. C. A. 3671. The Court concludes that if the lien is not considered as applying to after acquired property, the amendment is meaningless for the lien would continue in any event as to property owned when the lien arose.

The duration of the lien, prior to the amendment, was indefinite, and it might exist for any period of time. The amendment put two very definite limitations on its life. Under the amendment, the lien ceases to exist when the tax is paid or when the six year limitation imposed by 53 Stat. 87, 26 U. S. C A. 276, is reached, unless the lien is extended by agreement. Certainly the duration of the lien has nothing whatever to do with the property to which it attaches. By the very language of Section 3671, the lien arises when the collector receives the assessment. Had congress intended Section 3671 to have the meaning ascribed to it by the Court in the Citizens National Bank case, and by the court below in this case, it would have changed the portion of the section that specifies when the lien begins, and not the portion of the section that provides for its termination. Had congress intended that after acquired was to be reached by the sweeping provisions of Sections 3670 and 3671, it would have used such language in 3671 as "the lien shall arise at the time the assessment list was received by the collector as to property and rights of property then owned by the taxable and from the date the taxable acquires the

property or right of property in the case of after acquired property, and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

The administrative interpretations relied upon by the Court in the Citizens National Bank case say nothing whatever about liens attaching to after acquired property. What they do is to admonish the collectors to make careful investigations as to whether the delinquent is likely to acquire property in the future and to obtain extensions so that appropriate action can be taken.

Congress, in subsequent sections of the Revenue Acts, has given collectors ample processes by which after acquired property may be either subjected to the lien of the taxes or seized and sold. 53 Stat. 450, 26 U. S. C. A. 3678 provides for a civil action whether distraint proceedings have been commenced or not. 53 Stat. 451, 26 U. S. C. A. 3690, provides for distraint and sale of almost every species of personal property. 53 Stat. 452, 26 U. S. C. A. 3692, authorizes the collector to levy on all property or rights of property "belonging to such person, or on which the lien provided in Section 3670 exists for the payment of the sum due * * *". This section certainly contemplates that the taxable may have some property which is not subject to the lien given in Section 3670, and that it may be desirable or necessary to obtain a lien on it.

If the construction contended for by the court below is correct, then no taxable could have any property at any time which is not subject to the lien. 53 Stat. 453, 26 U. S. C. A. 3709, provides for distraint on real estate. 53 Stat. 456, 26 U. S. C. A. 3710, makes provision for distraint on

property or rights of property in the possession of persons other than the taxable.

The regulations of the Treasury Department to which the Court refers as a partial basis for its interpretation—T. D. 4275, VIII—2 Cum. Bull. 167 (1929), reads, in part, as follows:

> "Tax liabilities frequently are unenforceable in fact for the time being, due to the temporary nonpossession by the taxpayer of discoverable property or property rights. In all cases the liability for the payment of the tax continues until satisfaction of the tax in full or until the expiration of the statutory period for collection, including such period as the taxpayer by consent in writing may agree with the Commissioner shall constitute the time which the tax assessed may lawfully be collected. Collectors should continue to investigate carefully all cases of delinquent taxpayers where notice of lien has been filed, with a view to obtaining, before the expiration of the collection period, such written consent for the extension of the collection period, whenever it is reasonably possible that the taxpayer may, in the future, acquire property or property rights from which the tax liability may be satisfied. * * *"

It is perfectly plain that the Treasury Department intended to instruct collectors to investigate carefully and to avail themselves of the remedies provided in the several sections of the Revenue laws in order to subject property or property rights to the payment of the tax. Certainly there is nothing in the language of the Bulletin that warrants the

supposition that the Treasury Department was interpreting Section 3670 to extend to and include after acquired property.

The next reason advanced by the Court in the Citizens National Bank case is that there is an analogy between a federal tax-lien and a judgment. In California, a judgment evidently automatically attaches to after acquired real estate. This is not the case in Pennsylvania. In Pennsylvania, the lien of the judgment attaches to after acquired real estate only when a writ of sci. fa. or a writ of fi. fa. is issued, and the lien of a judgment attaches to personalty only when the property is reached by a writ of fi. fa. or execution attachment. *Packer's Appeal*, 6 Pa. 277.

The Court below rejected this reasoning, saying:

> "This reason is inapplicable in the instant case for we are not here dealing with after acquired real estate." (R. 21)

IF A LIEN EVER EXISTED, IT WAS LOST

The government's claim is also defeated by its failure within the period permitted by law to take the action it was required to take to bring the fund within its possession or control.

Section 3670 is not self executing. It contains no provision for sale, and no provision under which the collector can automatically reduce the property or right of property to possession. To accomplish this, the government must resort to one or more of the methods of procedure provided

by congress. It may file a civil action to enforce a lien under Section 3678. It may proceed by distraint and sell under Section 3690, or under Section 3692, it may levy on all property and rights of property belonging to the taxable, or on which the government has a lien under Section 3670.

Distraint on real estate is provided for in Section 3700, and proceedings in the nature of execution attachment are set up under Section 3710.

The government is not only required to take some action in order to make the provisions of Section 3670 effective but it is required to do so within a definite time. 53 Stat. 87, 26 U. S. C. A. 276, provides:

> "Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of six year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Almost ten years have elapsed since the tax was assessed in this case, and the government has not yet begun any proceedings by distraint or otherwise to reduce the fund in suit to possession. As heretofore noted, the collector received the assessment lists on August 12th, 1935. The collector was allowed six years from that date to en-

force the lien as to any property to which Section 3670 was applicable. Section 276 is specific that such proceedings can be maintained only if started within the period specified by the statute.

This proceeding was instituted, not by the government, but by the Glass City Bank. The bank had sought leave to proceed with its attachment execution in the State Court (R. 3a). On April 29th, 1942, the District Court, in an opinion which set forth that since its own Trustees were involved, jurisdiction to determine the disposition of the fund should be retained by the United States Court. (R. 3a). The bank was, therefore, restrained from proceeding in the State Court (R. 3a). This was followed by a petition of the Glass City Bank for a rule on the Collector of Internal Revenue, the First National Bank in Greensburg, (a claimant under an assignment), and the Trustees for the Victor Brewing Company, and upon F. A. Maddas, the taxable, to show cause why the fund should not be paid to the Glass City Bank (R. 5a). Answers were filed by the several parties involved, and the Collector of Internal Revenue was thus, for the first time, brought upon the record (R. 8a). The six year limitation imposed by the Act had then passed, and if the United States ever had a lien on this fund, it was then lost.

The government asserted its claim, and based it on Section 3670, but made no effort to show either that an appropriate proceeding had been started within the six year period or that the period of limitations had been waived.

Since the government claims a lien, it was incumbent upon it to show, first, that the lien attached to the fund at some time, and second, that it had not ceased to exist by

operation of law. If the government claimed that a valid extension agreement had been entered into, it had the burden of showing this. *United States v. Wigmore* (D. C. Cal. 1943), 48 F. Supp. 250.

SUMMARY

This court is concerned with the interpretation and application of the law as it finds it; and is under no duty, and has no right to question the Acts of Congress beyond the plain limits of the language employed by congress. An examination of the cases that have arisen under Section 3670 that there was ample reason for the language of Judge McCarey in the case of *United States v. Union Pacific Railroad et al.*, 1 F. 97, when he said:

> "This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take steps in the direction of making collections, in all cases where there is delinquency."

What was said there with respect to land title applies with even greater force to personalty. In Pennsylvania,

and in practically every other State in the Union, possession of personal property has always been the badge of ownership. Liens and pledges of personal property, unaccompanied by possession are virtually unknown. When a garage man or mechanic parts with possession of the machine he has repaired, he loses his lien. The same is true of a banker who relinquishes pledged securities. Possession is essential to a lien on chattels. *Clemson v. Davidson,* 5 Binn. 392.

It required an act of assembly to validate conditional sales in Pennsylvania, and such sales are valid only as to particular property and under certain circumstances, and when the conditional sales agreement is recorded. *Anchor Concrete Machinery Company v. Pennsylvania Brick & Tile Company;* 292 Pa. 86, 90, 91.

In *Mitchell et al. v. Standard Repair Company,* 119 A. 410, 275 Pa. 328, the Supreme Court of Pennsylvania, after reviewing a number of instances in which liens are allowed on personal property, thus giving the lien holder a right to possession as against the owner, said:

> "The commercial customs of today do not favor the tying-up of personal property by liens; and if the courts should now countenance any such general attitude toward the credit system as that announced in the case relied on by appellant, business, as that term is presently understood, would come to a standstill; * * *."

Returning to the cases decided under Section 3670, the Court will find that the contests are seldom between taxables and the government but are between innocent pur-

chasers, pledgees, mortgagees or judgment creditors and the government. Taxables, innocently in practically all cases, have sold or pledged or mortgaged their property and received the money and disposed of it. The government asserts a prior lien on the property and in a large number of cases has been successful. The result has been that the taxpayer goes free and an innocent person suffers.

If the statute is extended by an artificial interpretation beyond the plain words employed by congress, then an even greater number of innocent persons will be required to pay. Our economic system is such that the greatest measure of freedom must be given to citizens to trade and work and employ unhampered by a secret lien which the government may months or years later assert.

If the interpretation placed on 3670 by the Court below is permitted to stand, it will be increasingly difficult for any person against whom a tax lien has been filed to get a new start or even to obtain employment. It would be hazardous for any one engaged in business or trade of any kind to deal with him.

If 3670 is as sweeping and broad and as all inclusive as stated by the Court below, then it ought to be declared so to be by this Court. Neither the Government nor people who, in the ordinary course of business, must deal with others against whom tax liens have been filed ought to be left under the doubt that must arise from the conflicting decisions on the same subject by different Circuits.

Congress, in plain words, has definitely fixed the time when the lien arises. In unmistakable terms, it has stated that the lien of Section 3670 affixed itself to property of the bankrupt at the time the assessment list is received

by the collector. This can apply only to existing property.

Under the decisions of the Pennsylvania Courts, and the Courts of many other States, future earning power is not property.

The fiction adopted by the Court below that the lien attaches to after acquired property is in direct conflict with the statute which provides when the lien shall arise. Congress has expressly recognized that a taxable may own or acquire property not subject to the lien covered by Section 3690, and has empowered the collector by civil action (Section 3678), by distraint (Section 3690), or by levy (Section 3692) to acquire a lien on such property or to subject it to the payment of the tax. These remedies are given not only to enforce a lien which the Government may have against a property but "to subject any such property * * * to the payment of such tax." (Sections 3678, 3692). Until the collector has resorted to one of these methods, the Government has no lien on after acquired property.

Moreover, Congress has definitely limited the life of the lien by Section 3670 by requiring the Government to proceed by distraint or by civil action, or by one of the other methods enacted for the enforcement of its lien within six years from the time the lien was acquired.

If the Government ever had a lien in this case, it acquired it August 12th, 1935, and lost it August 12th, 1941. Having failed to take any action to enforce its lien or to show that the time for enforcement had been extended as provided in the Act, any right which ever existed is now lost.

It is, therefore, respectfully submitted that the decision of the Third Circuit should be reviewed by this Court, and the Order there made reversed, and judgment entered for the petitioner, Glass City Bank.

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